

1 APPEARANCES (cont.):

2 EXELON BUSINESS SERVICES, by
3 MS. FELICIA FRANCO-FEINBERG
4 10 South Dearborn Street
5 Floor 35
6 Chicago, Illinois 60603
7 appearing for respondent.
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21 SULLIVAN REPORTING COMPANY, by
22 Jean M. Plomin, CSR, RPR
License No. 084-003728

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I N D E X

Witnesses: Direct Cross Re-direct Re-cross By Examiner

None.

E X H I B I T S

Number For Identification In Evidence

None.

1 JUDGE RILEY: Pursuant to the direction of the
2 Illinois Commerce Commission, I now call
3 Docket 03-0667. This is a complaint by James Hintz
4 versus Commonwealth Edison Company as to calculation
5 of initial standby capacity, KW being kilowatt, for
6 peak periods under Rate 18 in Lincolnshire, Illinois.

7 And you are the representative for the
8 complainant?

9 MS. ROGERS: Yes. My name is Nanci Rogers, and
10 I'm here representing James Hintz and Stevenson High
11 School District 125.

12 JUDGE RILEY: And your position?

13 MS. ROGERS: Well, I'd like to explain. First
14 of all, it's, I guess, a rather unusual situation for
15 a prehearing conference. I actually was just
16 informed and involved in this matter Monday afternoon
17 by the school district.

18 Mr. Hintz is the assistant
19 superintendent for business for the school district,
20 and he filed this complaint presumably on behalf of
21 the school district. He certainly intended to file
22 it on behalf of the school district for Stevenson

1 High School.

2 When he filed this before counsel was
3 involved, he and the consultant for the district
4 filed this, it appears, in the name of James Hintz,
5 but he intended to file it on behalf of the district.
6 Certainly the school district is the real customer of
7 Commonwealth Edison, not Mr. Hintz.

8 JUDGE RILEY: And you said Mr. Hintz is the
9 business manager?

10 MS. ROGERS: He is the assistant superintendent
11 for business, right, of Stevenson High School
12 District 125.

13 In speaking with counsel for
14 Commonwealth Edison yesterday, which I immediately
15 contacted when being informed by the school district
16 whom we represent in other matters on a regular basis
17 that they would like to have us handle this matter, I
18 think counsel and I agreed that this complaint was
19 inappropriately filed appearing to be in the
20 individual capacity of Mr. Hintz. Certainly the
21 complaint, I believe, needs to be amended to reflect
22 that it's brought on behalf of Stevenson High School

1 District 125.

2 JUDGE RILEY: Okay. And let me get the
3 spelling of your name. I'm sorry.

4 MS. ROGERS: It's N-a-n-c-i, R-o-g-e-r-s.

5 JUDGE RILEY: And your title is?

6 MS. ROGERS: Attorney.

7 JUDGE RILEY: You are the attorney. And that's
8 the attorney for the district?

9 MS. ROGERS: For Stevenson High School
10 District. If you would like my firm name, I can --
11 would you like a card? Would that be helpful?

12 JUDGE RILEY: Yes. As a matter of fact, you
13 can give it to the court reporter too.

14 MS. ROGERS: Let me do that.

15 JUDGE RILEY: Is it my understanding then that
16 you are moving for an amendment to the application --
17 I'm sorry -- to the complaint?

18 MS. ROGERS: What I would like to do today is
19 move for a continuance of the prehearing conference
20 for 60 days in order to give us time to amend the
21 complaint to reflect that it's on behalf of the
22 school district and also because I haven't had time

1 to review the facts of the matter with my client, to
2 actually do that and talk briefly with counsel for
3 Commonwealth Edison hopefully to be able to better
4 define what the issues are so that the next time we
5 meet if we can continue this, it will be productive
6 and getting down to issues.

7 JUDGE RILEY: Well, let me get your appearance
8 for the record, please.

9 MS. FRANCO-FEINBERG: Certainly, your Honor.
10 Felicia Franco-Feinberg on behalf of Commonwealth
11 Edison Company, Exelon Business Services, 10 South
12 Dearborn, Floor 35, Chicago, Illinois, 60603.

13 JUDGE RILEY: Ms. Rogers, what is your office
14 address?

15 MS. ROGERS: It's 20 North Clark, Suite 900,
16 Chicago, Illinois, 60602.

17 JUDGE RILEY: Now that we've dispensed with the
18 appearances, what is ComEd's response?

19 MS. FRANCO-FEINBERG: Commonwealth Edison
20 agrees that Mr. Hintz is not the appropriate party in
21 this proceeding.

22 Counsel for the school district and

1 counsel for ComEd spoke yesterday. There's a
2 procedural hurdle that still needs to occur in the
3 sense that the school district in order to bring
4 litigation as a general matter needs to have a school
5 board resolution passed commencing litigation and
6 authorizing litigation. That has not, as I
7 understand from Ms. Rogers, occurred yet. Therefore,
8 in a sense, this complaint is prematurely filed.
9 Ms. Rogers represented that it will likely be
10 ratified, but that has not yet occurred.

11 So as a procedural matter, ComEd's
12 position would be that a dismissal would be more
13 appropriate and that the school district would then
14 file a complaint if and when that ratification
15 occurred but would not be one to object if the
16 Hearing Examiner thinks that the amendment procedure
17 would be more appropriate.

18 JUDGE RILEY: What you're saying is that
19 insofar as the school board did not approve the
20 issuance of this complaint or the initiation of this
21 complaint, it's not valid; is that --

22 MS. FRANCO-FEINBERG: Under Illinois law,

1 that's my understanding. It has not been authorized
2 by the school district and cannot occur yet on behalf
3 of the school district.

4 MS. ROGERS: And, in fact, it's certainly
5 correct that the school district hasn't formally
6 authorized it and we do, as a school district, need
7 to commence with the formal procedure of having the
8 board of education pass a formal resolution
9 authorizing the complaint.

10 The board of education has, however,
11 discussed this matter with Mr. Hintz and with the
12 representative from Johnson Controls and knows that
13 the complaint was going to be filed and understands
14 the issues but hasn't formally authorized it. The
15 board of education meets on December 15, and we
16 expect that at that meeting the formal resolution
17 will be passed.

18 In terms of a dismissal, if that's
19 what your Honor deems the best result from this
20 meeting, I wouldn't object to that, of course. We
21 would like to request a continuance rather than a
22 dismissal only so there's no question as to the

1 timeliness of filing if that would become an issue in
2 the future as to amending as opposed to dismissing
3 and refiling.

4 JUDGE RILEY: Counsel, to your knowledge does
5 Illinois law preclude the filing of this complaint;
6 in other words, this complaint cannot exist under
7 certain circumstances?

8 MS. FRANCO-FEINBERG: It is my understanding
9 that a school district board must authorize
10 litigation under Illinois law is my understanding of
11 what's required before litigation can be commenced.

12 JUDGE RILEY: What I'm getting to, as a
13 practical matter for me to submit a memo to the
14 Illinois Commerce Commission withdrawing this matter,
15 I don't believe that I can even get it on for the
16 17th of December at this point, so it would be well
17 into January, the first or second session then before
18 this matter would even be withdrawn.

19 MS. ROGERS: By that time hopefully we would
20 have been able to amend --

21 JUDGE RILEY: You would have the resolution
22 that you need, and you would be able to file the

1 amended complaint based on that resolution.

2 MS. ROGERS: Right.

3 MS. FRANCO-FEINBERG: And I think that's what
4 we were trying to indicate, your Honor. We believe
5 procedurally under Illinois law a dismissal would be
6 more appropriate. But if given the pragmatics here
7 and the representation by Ms. Rogers that the
8 resolution from the board is imminent, if your Honor
9 would like to instead require an amendment, we would
10 not have an objection.

11 JUDGE RILEY: Do you have a cite for the
12 statute?

13 MS. FRANCO-FEINBERG: If you can give me a
14 moment, your Honor, I think I do have it.

15 I may not have it. I don't think I
16 have it here, your Honor. I apologize. I can
17 probably provide the cite afterwards if that would be
18 of assistance to both you and Ms. Rogers depending on
19 how you would like to proceed.

20 JUDGE RILEY: Well, what I'm afraid of is that
21 if it's a controlling statute and the parties
22 can't -- strike that.

1 If the statute is controlling, then
2 that's the only way we have to go, and I'd have to
3 see that before I make a decision on anything else
4 here. I know we already spent quite a bit of time --

5 MS. ROGERS: If I just may ask a question and I
6 apologize for not being familiar with all the
7 fundamentals and just becoming aware of this in the
8 last 36 hours, but does counsel foresee -- I mean, is
9 there a statute of limitations that you're aware
10 of -- I'm not -- in terms of, you know, what the
11 length of time would be to bring a complaint based on
12 a dispute over the initial standby capacity under
13 Rate 18?

14 MS. FRANCO-FEINBERG: There is a statute of
15 limitations under the Commission's rules requiring
16 actions be brought within two years of, for example,
17 a bill or the incident that triggers it.

18 MS. ROGERS: My concern is the original oral
19 complaint -- well, the original initial contract was
20 discussed last April, and this flows from an initial
21 contract that was rejected, a complaint that was
22 filed in July, formal complaint -- a telephone

1 complaint -- I'm sorry -- in July and then the formal
2 complaint in October which is all flowing from an
3 initial discussed contract last April.

4 JUDGE RILEY: Right.

5 MS. ROGERS: And I just want to be sure that if
6 we dismiss this and refile, we're not going to run
7 into an issue of untimely filing.

8 And, again, I apologize for not having
9 all the background information to know if that would
10 be an issue or not, but honestly at this point I
11 don't. I want to make sure that the client isn't
12 disadvantaged unnecessarily if we don't have to
13 dismiss and refile and if we can just, from a
14 pragmatic point of view, have a continuance to
15 extend, December 15 have the authorization, and then
16 move forward.

17 JUDGE RILEY: I'm certainly leaning more toward
18 keeping this docket open, filing the amended
19 complaint with the proper resolution. And, like I
20 say, my chief concern is that there's a statute that
21 will not allow us to do that and that's why I'm --

22 MS. FRANCO-FEINBERG: Right. And I understand

1 your concern, your Honor, and I think we're all
2 trying to get the case in the correct procedural
3 posture.

4 JUDGE RILEY: We can't contravene a statute.

5 MS. FRANCO-FEINBERG: Right. Perhaps one way
6 to address this is I can return to my office and
7 determine if there is a statute that is as clear as
8 you're indicating, whether it specifically requires
9 board authorization before any litigation can be
10 commenced and absent such ratification or absent such
11 authorization litigation cannot proceed.

12 JUDGE RILEY: Right.

13 MS. FRANCO-FEINBERG: If so, we would be in a
14 position to notify your Honor and counsel certainly
15 by tomorrow. And I don't know if you would like to
16 say that absent some notification from ComEd of such
17 a statutory reference, that the complaint would be
18 amended instead. That's one potential proposal.

19 May I ask, counsel, is it your
20 understanding that under Illinois law a complaint
21 cannot be filed?

22 MS. ROGERS: A formal complaint in a court of

1 law needs to have a resolution from the board in
2 order to be filed, but that's under school law. In
3 order to bind the district, there has to be a formal
4 resolution passed.

5 From the point of view of can
6 something actually be filed at an administrative
7 hearing environment by a representative of the
8 district prior to the actual ratification and
9 authorization by the school board, I'm not sure.

10 JUDGE RILEY: Okay. And we don't know whether
11 or not the resolution would cure the defect then; in
12 other words, an amended application substituting the
13 proper party on the complaint with the attached
14 resolution --

15 MS. ROGERS: That would certainly -- that
16 should certainly cure --

17 JUDGE RILEY: From my standpoint it would. I
18 just don't know if the statute precludes it. That's
19 my only concern.

20 MS. FRANCO-FEINBERG: Well, I believe that
21 Ms. Rogers and I are referring to the same statutory
22 cite, and it would be ComEd's understanding that a

1 formal complaint at the Commission would be no
2 different than a formal complaint in state court in
3 the sense that should, for example, ComEd's position
4 prevail, the school district would be similarly bound
5 by any requirement or order, for example, requiring
6 the school district to pay a certain amount,
7 et cetera.

8 So there would be no difference in
9 terms of the fact that this is a complaint before the
10 Illinois Commerce Commission versus a formal
11 complaint in state court. I think Ms. Rogers is
12 indicating that, in fact, under Illinois school code
13 law, a formal complaint, at least in state court,
14 clearly needs to have board ratification before any
15 such filing can occur and be viewed as a valid
16 complaint.

17 MS. ROGERS: In order to bind the body politic
18 of the school district.

19 MS. FRANCO-FEINBERG: And I would think here
20 similarly the Illinois Commerce Commission would be
21 binding the school district and therefore the school
22 district would need to have notice and approval of

1 the commencement of any such action.

2 JUDGE RILEY: See, that's what we may have to
3 deal with.

4 Are the parties willing to be
5 available on Friday by telephone?

6 MS. ROGERS: I am.

7 MS. FRANCO-FEINBERG: That would be fine with
8 me, your Honor.

9 JUDGE RILEY: Counsel -- okay. Okay. All
10 right. Do I have your card? Do I have your number?

11 MS. FRANCO-FEINBERG: I may have given my last
12 card to Ms. Rogers today.

13 MS. ROGERS: I can get another one from you and
14 pass this along if you would like.

15 JUDGE RILEY: That's okay.

16 MS. FRANCO-FEINBERG: I'm certainly happy to
17 provide the number.

18 JUDGE RILEY: I can just write the number down
19 here. Hold on. 3019; is that correct?

20 MS. FRANCO-FEINBERG: Yes, your Honor.

21 JUDGE RILEY: I got the number.

22 MS. ROGERS: Thanks.

1 JUDGE RILEY: What I was going to propose is
2 that at 10:00 a.m. -- if you can get the statute, the
3 cite to me that you're talking about, counsel, let me
4 review it, read it and see what interpretation I can
5 come up with. That's not the best way of putting
6 that, but it will let me see what guidance I can get
7 from the statute.

8 MS. FRANCO-FEINBERG: Certainly.

9 JUDGE RILEY: And then what I will do is
10 initiate a call at 10:00 a.m. on Friday and I can let
11 you know then. We'll do this telephonically. I'll
12 have a court reporter present. But, again, it will
13 be an informal status session. And then I can advise
14 the parties as to what I think and how we should
15 proceed at that point. I think that's the safest way
16 of proceeding right now. Until we've read the
17 statute and we're comfortable with its content, I
18 would rather not make any other decisions until we do
19 that.

20 And it's possible that it may let us
21 proceed in an amended capacity, or we may have to
22 dismiss and start over again. But let's see what the

1 statute says and get some guidance from that and then
2 proceed from there.

3 MS. ROGERS: That's certainly agreeable.

4 JUDGE RILEY: Like I say, it will not be a long
5 involved phone call. It shouldn't take up an awful
6 lot of time.

7 MS. ROGERS: And to the extent that it's
8 relevant in your interpretation of the statute, the
9 board has considered this informally but won't be
10 ratifying it until December 15.

11 JUDGE RILEY: 15th, right.

12 MS. ROGERS: But I feel very confident that
13 there's no issue; that it will be ratified on the
14 15th.

15 JUDGE RILEY: Okay. Right. But the rest of
16 that we can deal with as we proceed. But let's get
17 the statute first, see what it says and see if that
18 doesn't give us a beacon of some kind that we can
19 hone in on.

20 Is there anything else?

21 MS. FRANCO-FEINBERG: Not from ComEd, your
22 Honor.

1 JUDGE RILEY: Okay. Then I will contact both
2 parties on conference call. And, again, it will be
3 with a court reporter present on Friday, December 5,
4 and we'll go over this matter again and see where we
5 are at that point, and we can make some informed
6 decisions.

7 Thank you very much.

8 (Whereupon, the above-entitled
9 matter was continued to
10 December 5, 2003, at 10:00 a.m.)

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